Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
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No. 87-1252

In The
Supreme Court of the United States
October Term, 1987

H.J. Inc., a Minnesota corporation, Kirk Dahl, Larry Krugen and Mary Krugen, individually and d/b/a Photo Images, Susan Davis, Robert Neal, Isaac H. Ward, Richard L. Anderson, Thomas J. Mott, and all others similarly situated,

Petitioners,

vs.

Northwestern Bell Telephone Company, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED

1. Whether petitioners have alleged a "pattern of racketeering activity" under RICO, 18 U.S.C. § 1961-68.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the Eighth Circuit (Supreme Court Rule 21.1(b)).

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OPINIONS BELOW

The opinion of the Eighth Circuit denying rehearing, dated October 23, 1987 is not officially reported. The full opinion, decided September 22, 1987 is officially reported at 829 F.2d 648 (8th Cir. 1987). The opinions of the district court filed November 24, 1986 and February 18, 1987 are officially reported at 648 F. Supp. 419 (D. Minn. 1986).

The Eighth Circuit opinion denying rehearing is reprinted in the Appendix, beginning at A-1. The full opinion, dated September 22, 1987 is reprinted in the Appendix beginning at A-4. The district court decisions filed November 24, 1986 and February 18, 1987 are reprinted in the Appendix at A-31 and A-11 respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment denying rehearing of the Court of Appeals for the Eighth Circuit was entered on October 23, 1987. The Petition for Certiorari was filed on January 20, 1988 and Certiorari was granted on March 21, 1988.

PROVISIONS OF STATUTE INVOLVED

18 U.S.C. § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, rob-

bery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

• • •

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interests in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase

do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

—o—

STATEMENT OF THE CASE

This is a putative class action arising under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-1968. Petitioners filed and served their Summons and Complaint on July 8, 1986. Petitioners' First Amended Complaint (Appendix I, P. 70) was filed and served on July 15, 1986. Petitioners alleged that Respondents committed acts in violation of 18 U.S.C. §§ 1962(a), (b), (c) and (d). In addition to federal claims, petitioners alleged state law violations pursuant to the court's pendant jurisdiction which consisted of acts of bribery in contravention of Minn. Stat. § 609.42, subd. 1(1) and (2) and common law bribery.

Oral arguments were heard in the district court on October 1, 1986. By order dated November 21, 1986, the court granted Respondent Northwestern Bell Telephone Company's (Northwestern Bell) motion to dismiss the Complaint in its entirety on the grounds that the Petitioners had failed to allege a "pattern" of racketeering activity and, on the 1962(a) count, the fact that there was no person/enterprise distinction. In addition, the court found that under the "filed rate" doctrine, Petitioners' cause of action was not federally cognizable.

Petitioners filed a motion to amend or reconsider on December 3, 1986 which the District Court denied on February 10, 1987. Petitioners appealed to the Eighth Circuit on March 20, 1987. Oral arguments were heard on September 2, 1987 and the Opinion was filed on September 22, 1987 affirming the trial court's dismissal of Petitioners' Complaint in that Petitioners had failed to allege a RICO pattern of racketeering activity. On October 23, 1987, Petitioners' petition for rehearing en banc, filed October 4, 1987 was denied. Petitioners filed their petition for certiorari on January 20, 1988. This Court granted the Writ on March 21, 1988.

Unlike many RICO claims, this case does not involve "garden variety" fraud allegations. Petitioners allege that from January 1, 1980 through the present Respondent Northwestern Bell conducted different acts of bribery directed at members of the Minnesota Public Utilities Commission who were sitting in their quasi-judicial function.[1]

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[1] Although Respondent will allege that Northwestern Bell has committed no wrongdoing, it should be noted that the Min-

(Continued on following page)

Payments of over one hundred thousand dollars were made to different commissioners through various methods by separate Northwestern Bell employees and agents. In one of these situations, payments were made through a middle man, and were hidden in the defendant's records as "attorney fees." In another ploy, employment negotiations took place with a sitting commissioner resulting in her receiving over $100,000.00 in "consulting fees" within a year after leaving the commission. In another scenario, parties, gifts, and a great number of meals were paid for by defendant for commissioners, the frequency of which rose dramatically during critical commission rate hearings.

The votes at the tainted hearings resulted in increases well beyond the amounts originally recommended by administrative law judges. Despite the pleading of these and other incidents of bribery, the District and Circuit Courts found that only one scheme to bribe the commissioners existed, and that more than one scheme was necessary for a pattern.

Plaintiffs seek to recover damages suffered by Plaintiffs and the class due to the improper rate increases. These illegal charges were the result of bribery, attempts to bribe, conspiracy and the racketeering activities alleged. Plaintiffs also seek, as a class, interest, reasonable attorneys fees, punitive and treble damages. Plaintiffs also applied for an injunction preventing Defendants from engaging in further illegal activity and other relief as the Court deems just and proper.

(Continued from previous page)

nesota Court of Appeals has already recognized the tainting of the quasi-judicial function of the MPUC by Respondent. See, *Matter of Public Utilities Commission*, 417 N.W.2d 274 (Minn. App. 1987). The tainted rate hearing is but one part of the activities considered in Petitioners' action.

SUMMARY OF ARGUMENT

Petitioners' RICO complaint was dismissed under the Eighth Circuit's multiple scheme pattern requirement. Petitioners are now before this Court requesting that the "multiple scheme" requirement be rejected and Petitioners' complaint reinstated.

Since *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 (1985), the courts have been in chaos regarding application of the RICO pattern requirement. The Eighth Circuit has become the most restrictive by adopting a requirement that the pattern be formed with multiple schemes. This requirement is in conflict with the statutory language, the legislative history, and this Court's decision in *Sedima*. Furthermore, the Eighth Circuit restriction conflicts with other portions of the statute and the purposes and practical application of both criminal and civil RICO. Other circuits have overwhelmingly criticized and rejected the Eighth Circuit's position, but in adopting other, less restrictive standards, the circuits have failed to develop a unified definition, therefore causing a serious split in the circuits. Conflicting pattern requirements have led to an uneven application of RICO, placing RICO plaintiffs in the untennable position of having claims accepted or rejected based on the circuit in which they are brought.

Petitioners urge this Court to reject the pattern requirement as defined by the Eighth Circuit, and to reinstate Petitioners' Complaint by finding that the Petitioners have adequately alleged a pattern for RICO purposes. Petitioners also urge this Court to fashion a definition of the RICO pattern which will guide the circuit and district courts in review of future civil and criminal RICO complaints.

ARGUMENT

In order to establish a RICO cause of action, four elements must be proven. These elements are 1) conduct, 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 (1985). Of these elements, at issue in the case at bar is whether petitioners' Complaint satisfies an essential element of the RICO cause of action by showing that the respondents engaged in a pattern of racketeering activity. The Eighth Circuit affirmed the trial court's dismissal of Petitioners' Complaint, finding that Petitioners had not sufficiently pleaded a pattern of racketeering activity. Petitioners request that this Court review the Eighth Circuit's "multiple scheme" pattern requirement and the dismissal of Petitioners' RICO Complaint. Petitioners allege that the Eighth Circuit's interpretation is contrary to the statutory language, the legislative history, and this Court's interpretation of the statute in *Sedima*. The Eighth Circuit's pattern definition should be rejected by this Court and the dismissal of Petitioners' Complaint should be reversed. This Court is also requested to develop a meaningful definition of the term "pattern" in a manner consistent with the statute, thereby ending the chaos that exists in the circuit courts regarding this issue.

I. The Eighth Circuit's interpretation of "pattern" should be rejected and the dismissal of Petitioners' Complaint reversed.

In a properly pleaded RICO complaint, a pattern of racketeering activity must be shown. Under 18 U.S.C. § 1961(5), a pattern "requires at least two acts of racketeering activity, one of which occurred after the effective

date of this chapter and the last of which occurred within 10 years . . . after the commission of a prior act of racketeering activity. . . ." This Court has not yet directly ruled on this portion of the RICO statute. The circuit and district courts however, have looked to *Sedima S.P.R.L. v. Imrex Company Inc.*, 473 U.S. 479 (1985) as a basis for interpreting the pattern requirement.

Sedima was not a case in which pattern was questioned; rather, *Sedima* addressed whether the plaintiff failed to allege an injury "by reason of" a violation of § 1962 and whether the complaint was defective in that it did not allege that the respondents had already been criminally convicted of the predicate acts of mail and wire fraud or of a separate RICO violation. This Court found that these artificial restrictions, instituted by the lower courts, could not be used to limit civil RICO's application. This Court specifically noted that the general principle surrounding the RICO statute is that it is to be read broadly. *Id.* at 497. "This is the lesson not only of Congress' self-consciously expansive language and overall approach, . . . but also of its expressed admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Id.* at 497-98 (citations omitted). In discussing the issues in the case, this Court made a short reference to the pattern requirement. This Court in dicta stated:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern". The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "This target of [RICO] is thus not sporadic activity. This infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added).

Id. at 496, n. 14.

Rather than focusing on the policy statements contained in the text, the courts, and specifically the Eighth Circuit, have chosen to focus on the wording "continuity plus relationship" contained in footnote 14. In effect, this dicta has been seized upon by courts throughout the country to graft new restrictions upon the statute such as the Eighth Circuit's "multiple schemes" requirement.

The Eighth Circuit's restrictive definition of pattern was first announced in *Superior Oil Company v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). *Superior Oil* dealt with the theft of gas from a pipeline over a period of time. The act of theft in *Superior Oil* was characterized as "one isolated fraudulent scheme" instead of one isolated fraudulent act. The gravamen of the Eighth Circuit's restriction is found in that use of the term "scheme". The actions of the defendants were characterized as comprising "one continuing scheme to convert gas from Superior Oil's pipeline. Tnere was no proof that Fulmer, Branch or Nichols had ever done these activities in the past and there was no proof that they were engaged in other criminal activities elsewhere." *Id.* at 257. This analysis was unfortunately used in subsequent cases and has led the

Eighth Circuit to a definition of pattern which includes the requirement of multiple schemes and criminal activity other than that relevant to the RICO case being brought. *See, Ornest v. Delaware North Cos.*, 818 F.2d 651 (8th Cir. 1987); *Holmberg v. Morrisette*, 800 F.2d 205, 210 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987); *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986).

A review of the Eighth Circuit cases illustrates how this multiple scheme requirement is not only inconsistent with the statutory language, but has led to strained results as in this case. In the instant case numerous bribes were made, which, though related, were clearly separate; yet the court found only a single scheme existed, resulting in dismissal.

Similar tortured logic regarding the application of the "multiple scheme" requirement is revealed in *Madden v. Gluck*, 815 F.2d 1163 (8th Cir.), *cert. denied*, 108 S.Ct. 86 (1987), where the complaint alleged that the defendants engaged in a vast array of fraudulent activities by use of the mail and wire in violation of 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud). The acts included a check kiting scheme where the defendants drew 5,643 checks totaling $4,264,038.66 on Landmark St. Louis Bank and where Landmark received a total of $93,708.92 in check fees, a diversion of another company's corporate assets including funds totaling $7,755.00 withheld from employees for taxes, union dues, health insurance and other contributions, and a defrauding of creditors by preparing and distributing false financial statements. *Id.* at 1164. The court found that although the acts were sufficiently

related to form a pattern they constituted "mere subdivisions of only one fraudulent scheme." *Id.*

In *Allright Missouri, Inc. v. Billeter*, 829 F.2d 631 (8th Cir. 1987), plaintiffs brought an action regarding several fraudulent activities in connection with the sale and operation of limited partnerships. Allright consisted of limited partners in Downtown Development Association, a limited partnership formed by defendants. Plaintiffs alleged that material misrepresentations and omissions of fact were made in the original sale of the partnerships and that subsequent conveyances of partnership assets were improper. Plaintiffs alleged the following acts: 1) mail and wire fraud in connection with the original sale of the limited partnership interests, 2) the wrongful sale of Downtown Development's property and wrongful acts associated with the sale, and 3) improper diversion of other partnership assets to defendants. *Id.* at 641. In spite of the existence of these three separate fraudulent activities, the Eighth Circuit affirmed the district court's finding of only one scheme. The court stated: "Allrights' allegations, if true, evince only a solitary scheme by Burkhardt and Senturia to wrongfully deprive the limited partners of their investment in the partnership." *Id.* The court also was not disuaded from the view that it was only one scheme even though the acts occurred over a period of four years and were directed at several individuals and entities comprising the limited partnership interest. *Id.* Indeed, since *Superior Oil* the Eighth Circuit has dismissed virtually every civil RICO claim. They have done so based on the multiple scheme restriction without regard to the number of victims involved, the number of acts, or

the length of time over which the acts extend. *See Ornest v. Delaware North Companies,* 818 F.2d 651, 652 (8th Cir. 1987) (defendant skimmed money from gross receipts on vending machines and falsified daily and monthly gross receipts submitted to plaintiffs over an eight year period; RICO pattern rejected); *Deviries v. Prudential-Bache Securities Inc.,* 805 F.2d 326, 329 (8th Cir. 1986) (fraudulent security sales over course of six years does not constitute RICO pattern).

At this point, the Eighth Circuit's pattern decisions are not only extremely restrictive but are also inconsistent. Compare *Superior Oil* with *United States v. Ellison,* 793 F.2d 942, 950 (8th Cir.), *cert. denied,* 107 S.Ct. 415 (1986) (two arsons constituted a pattern because they stem from the same or similar purposes, involve the same groups of participants and had similar methods of commission) and *Alexander Grant and Co. v. Tiffany Industries Inc.,* 742 F.2d 408 (8th Cir. 1985) (injury as a result of a pervasive scheme of mail and wire fraud designed by defendant to obtain a favorable audit).

The definition of pattern used by the Eighth Circuit under which the instant case was dismissed does not comport with the statutory language, the legislative history or the policy statements of this Court in *Sedima.* Practically speaking, it is an unworkable standard, and it creates constitutional problems regarding the criminal sanctions which are allowed by RICO, is at odds with implementation of other portions of the statute and has been criticized and rejected by other circuits. This Court should reject the Eighth Circuit's interpretation by reversing its decision in this case and reinstate Petitioners' Complaint.

A. The Eighth Circuit's "multiple scheme" requirement is in conflict with the RICO statute.

The RICO statute defines "pattern of racketeering activity" very simply. It only requires "at least two acts of racketeering activity" 18 U.S.C. § 1961(5) (1982), such as, as pleaded in the instant case, at least two acts of bribery. Nowhere does the statute refer to "schemes" or "episodes." This is acknowledged by the Eighth Circuit itself. In this case, Judge John R. Gibson expressed his view "that the multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO." *H.J. Inc. v. Northwestern Bell,* 829 F.2d 648, 651 (8th Cir. 1987) (Gibson, J. concurring).

That this multiple scheme test is absent from the statutory language has been noted by other circuits. One of the most recent cases to discuss the Eighth Circuit's RICO pattern requirement is *Sun Savings and Loan Association v. Dierdorff,* 825 F.2d 187 (9th Cir. 1987). In discussing the positions taken by post *Sedima* courts, the *Dierdorff* court characterized the Eighth Circuit as holding that a series of predicate acts related to one fraudulent scheme or criminal episode would not constitute a pattern. *Id.* at 192, citing *Superior Oil Company, Inc. v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986). *Dierdorff* stated "it is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern under *Sedima.*" *Id.* at 193. The court further noted that there is "no sound basis for the view taken by some courts that a pattern requires more than one 'fraudulent scheme' or 'criminal episode.'" *Id.* The *Dierdorff* court found that requiring a plaintiff to show that the predicate acts are somehow both related and again sufficiently unconnected

in time was not supported by the language in RICO itself: "requiring temporal unconnectedness, i.e., separate acts, makes sense, but neither RICO's language nor *Sedima's* interpretation of it supports the requirement of substantive unconnectedness, i.e., separate episodes or schemes." *Id.* (footnote omitted). The court further noted that the effects of requiring such a balance would only "forestall RICO claims that are legitimate under the RICO Act itself, its legislative history, and the Supreme Court's interpretation of the Act." *Id.* at 194.

The Second Circuit in *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986), *cert. denied*, 107 S.Ct. 3230 (1987) has also criticized the pattern requirement adopted by the Eighth Circuit. The *Ianniello* court cited *Superior Oil Company v. Fulmer* in discussing that the Eighth Circuit required as part of its definition of pattern, proof that the defendants engaged in more than one scheme. The Court concluded that "forcing such a result from the word 'pattern' is a strained and inappropriate reading of the statutory language." *Id.* at 192. The court also noted that the multiple scheme requirement was neither grounded in the statutory language of RICO nor was there any clear legislative history to indicate that, for example, because mail fraud is listed as a predicate act, it means only "scheme like fraud." *Id.* at n. 16. The court felt that imposing such an element "violates the Supreme Court's admonition against adding requirements not grounded in the statute or the legislative history." *Id.*

Similarly, the Third Circuit has also rejected the position that the RICO statute requires two distinct schemes. In *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987), the court noted difficulties

with this type of interpretation. "First, 'scheme' is hardly a self defining term, and it appears nowhere in the RICO statute." *See also, Lawaetz v. Bank of Nova Scotia*, 653 F. Supp. 1278, 1286 (D. Virgin Islands 1987) (rejecting the Eighth Circuit's requirement for pattern as "legally unsupportable" stating that "RICO's language and legislative history are devoid of a multiple episode requirement.")

The multiple scheme requirement grafted onto the statute by the Eighth Circuit simply cannot be supported by the statutory language. To impose a reading on the statute contrary to its actual wording violates this Court's admonition against adding requirements not grounded in the statute. *See, United States v. Turkette*, 452 U.S. 576, 593 (1981). This is not the form of statutory amendment that is appropriately undertaken by the courts. *Sedima*, 473 U.S. at 500.

B. The Eighth Circuit's "multiple scheme" requirement is in conflict with the legislative history of the RICO statute.

In *Sedima*, this Court discussed the legislative history of the statute. Of note is the awareness that RICO was "an aggressive initiative to supplement old remedies to develop new methods for fighting crime." *Id.* at 498. The Court noted that it is in the spirit of this "aggressive initiative" that the acts must be interpreted. *Id.* Congress also wanted to reach through the RICO Act both "legitimate" and "illegitimate" enterprises. *Id.* at 497.

Sedima also specifically discussed the legislative history behind the "pattern of racketeering activity" requirement:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern". The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "This target of [RICO] is thus not sporadic activity. This infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) statement of Sen. McClellan). See also *id.* at 35193 (statement of Rep. Poff) (RICO) "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789 (1975).

Id. at 496, n. 14. Of note is that in the legislative history, the term "acts" is used: there is no reference to "scheme,"

"scheme-like activity" or multiple "episodes." The legislative history therefore does not support such an interpretation.

The failure of legislative history to support the Eighth Circuit's multiple scheme requirement has been noted by other courts. *See, Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987) ("even assuming one could adequately distinguish among multiple schemes, a rule requiring two or more schemes would exempt from RICO liability defendants who engage in a single unlawful scheme, however extensive and injurious. Such an outcome is plainly inconsistent with the purposes of the statute."); *United States v. Ianniello*, 808 F.2d 184, 192 n. 16 (2nd Cir. 1986), *cert. denied*, 107 S.Ct. 3230 (1987) ("Nor are we directed to any clear legislative history to indicate that when, for example, Congress listed mail fraud as an act, it meant only 'scheme-like' fraud.").

That the Eighth Circuit's "multiple-scheme" requirement is contrary to legislative history is well documented by the Senate discussions regarding the RICO bill. Senator Dole, in urging the adoption of the RICO bill, described the type of activity at which RICO would be aimed. He discussed a case involving a pattern of arson and murder against the A & P Tea Company in an unsuccessful effort to force A & P to sell a particular brand of detergent. 116 Cong. Rec. 36, 296 (1970). Although Congress obviously believed RICO would apply to such a situation, the "multiple-scheme" restriction would prevent a RICO action within the Eighth Circuit. Such a result is a repudiation of the legislative history.

In *Sedima*, this Court noted the expansiveness of the RICO statute given the plain wording of the statute in its

definition of pattern and the goals of the Congress in effectuating new ways to fight crime regarding "legitimate" and "illegitimate" businesses. 473 U.S. at 497-498. A reading of "multiple-scheme" into the statute is contrary to legislative intent. Therefore, the Eighth Circuit's multiple scheme requirement does not comport with the legislative history of the statute and should be rejected.

C. The Eighth Circuit's "multiple scheme" requirement is in conflict with the decision of Sedima.

The Eighth Circuit's multiple scheme requirement is contrary to the logical, statutory analysis in *Sedima*. In stating the reasons for *Sedima's* rejection of the restrictions placed on the statute by the lower court, this Court relied on the text of the statute. *Sedima* specifically rejected the requirement of a prior criminal conviction on the basis that "we can find no support in the statute's history, its language, or consideration of policy" for such a requirement. *Id.* at 493. Similarly, this Court, in rejecting the "racketeering injury" limitation stated: "A reading of the statute belies any such requirement." *Id.* at 495. This Court refused to judicially amend the statute. The implication of these holdings is that barriers to RICO claims which are not contained in the statutory language or history are not to be upheld. The Eighth Circuit's "multiplescheme" pattern requirement is a pure judicial creation with no foundation in the statute or history and should not be upheld.

The Eighth Circuit's "multiplescheme" requirement also places restrictions on RICO that are contrary to the specific language of *Sedima*. This Court noted that RICO is to be read broadly. *Id.* at 497. It noted that this lesson

is learned from "Congress' self-consciously expansive language and overall approach" as well as the express provision that "RICO is to be 'liberally construed to effectuate its remedial purposes.' " *Id.* at 497-98. *Sedima* observed that the statute's remedial purposes "are nowhere more evident than in the provisions of a private action for those injured by racketeering activity." *Id.* at 498. The Court also specifically stated that RICO was passed as an aggressive initiative to supplement old remedies and for the development of new methods in the fight against crime, and that it is within this "spirit" that all of the act's provisions should be read. *Id.* Allowing this multiple scheme restriction to stand is therefore contrary to the expansive reading that this Court has applied to the RICO act.

In *Bush Development Corporation v. Harbour Place Associates*, 632 F.Supp. 1359 (E.D.Va. 1986), the defendants urged the court to find no RICO pattern where there was only one scheme to defraud. The court rejected this argument noting that to do so would be to turn the "Supreme Court's reasoning on its head" and that the argument was out of line with the tenor of the remainder of the *Sedima* opinion:

> In short, the narrow reading of the pattern of racketeering requirement proposed by the defendant is, in principle, very similar to the criminal conviction and racketeering injury requirements that were rejected by this Court in *Sedima*. The source of these strained interpretations is the "extraordinary, if not outrageous uses to which civil RICO has been put," including its use in "everyday fraud cases". *Id.* at 3287. Nevertheless, the Supreme Court recognized that RICO's expansiveness reflects the statute's breadth,

> not its ambiguity and concluded that the statute's use against respected and legitimate enterprises was a direct result of the statute's language that could only be corrected by Congress. *Id.* at 3287.

Id. at 1366. It is ironic that *Sedima,* which struck down artificial limitations created by district courts trying to clear their dockets, has been itself used by courts to fashion new pattern limitations which likewise thwart the intent of RICO. To ignore the spirit of the *Sedima* decision and twist this Court's suggestion regarding "pattern" is to place baseless limitations on the statute. To accept the Eighth Circuit's "multiple scheme" requirement is, as the *Bush* court noted, "out of tenor" with the *Sedima* decision. This interpretation must be rejected.

D. The Eighth Circuit's "multiple scheme" requirement conflicts with other portions of the RICO statute.

The Eighth Circuit's "multiple scheme" restriction also conflicts with other portions of the RICO statute. This conflict is especially evident if the multiple scheme limitation of the Eighth Circuit is applied to § 1962(b), which deals with the takeover of an enterprise. A § 1962(b) count was pleaded in the instant case. Section 1962(b) states: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce."

This provision represents a major purpose of the RICO statute. *Russello v. United States,* 464 U.S. 16, 28 (1983); *United States v. Turkette,* 452 U.S. 576, 591 (1981).

Under the Eighth Circuit's test, no racketeering activity would be found where the acts are pursuant to a single scheme. Under § 1962(b), there is always a single scheme: that of taking over an enterprise. Section 1962(b) would then effectively be read out of the statute:

> This provision does not prohibit an enterprise which is committing predicate acts; rather it prohibits predicate acts which are aimed at taking over an enterprise. . . . It prohibits one scheme to acquire an interest in an interstate enterprise. To require two schemes as part of the *definition* of pattern under § 1961(5) would effectively eliminate this provision.

United States v. Ianniello, 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied,* 107 S.Ct. 3230 (1987) (footnote omitted).

Similarly, requiring a multiple scheme to create a pattern of racketeering activity potentially conflicts with § 1962(d) which is the conspiracy section of the RICO statute. This section was also pleaded in the instant case. § 1962(d) states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." A requirement of multiple schemes might defeat a single conspiracy charge and conversely, a showing of a single conspiracy may well preclude a finding of multiple schemes and thus a pattern. Such results would be untennable and clearly not within the contemplation of Congress.

E. The Eighth Circuit's "multiple scheme" requirement conflicts with the purposes and practical application of criminal and civil RICO.

In addition to civil penalties, RICO also authorizes criminal sanctions. RICO is considered to be the prosecutor's main weapons in organized crime, political corrup-

tion, white collar crime, and terrorism prosecutions. Oversight on civil RICO suits: *Hearings before the Senate Judiciary*, 99th Cong., 1st Sess. 106, 109-11 (1985) (testimony of Assistant Attorney General Steven Trott). Under the Eighth Circuit's pattern definition, however, prosecutors will face the probability that criminal RICO defendants will escape conviction. In the recent case of *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987), the defendants were tried on a thirteen count indictment. Count I alleged a RICO conspiracy charging that the defendants conspired to conduct or participate in the conduct of a drug enterprise's affairs through a pattern of racketeering activity. Count II charged the defendants with conducting or participating in the conduct of a drug enterprise's affairs through a pattern racketeering activity. The other counts involved conspiracy to import marijuana, conspiracy to distribute marijuana, conspiracy to import and distribute cocaine and quaaludes, traveling in interstate commerce to promote unlawful activity, possession with intent to distribute cocaine, using a telephone to facilitate marijuana exportations and distribution, interstate travel to promote marijuana exportation and distribution, transportation of Canadian currency to the United States without reporting it, and conspiracy to obstruct the Internal Revenue Service in the collection of taxes. *Id.* at 853. The court found that a pattern of racketeering activity did exist even under the Eighth Circuits restrictive view:

> Here we think it clear that even our more restrictive view of the pattern requirement has been met, for there is evidence of not two but three separate schemes: first, there was a scheme to import marijuana into La Junta; second, there was a cocaine-and-quaalude scheme; and third, there was a scheme to import marijuana into the Phoenix area.

Id. at 858. Thus, the *Kragness* court found liability under the RICO statute. However, it is clear that had there just been a scheme to import only one drug in La Junta, to import cocaine for example, these defendants would not have been subject to RICO liability despite numerous criminal acts over a long period of time, affecting many victims. No doubt, the multiple scheme restriction will limit the application of criminal RICO in the Eighth Circuit if not stricken.

This is even more clear in the context of the current case. The defendants here have not been criminally indicted. However, the Eighth Circuit has found that there was only one scheme—that of attempting to bribe the Minnesota Public Utilities Commission. Although Plaintiffs alleged numerous individual acts of bribery, if criminal indictments are ever returned in this case, none of the defendants would be subject to RICO criminal liability.

The results of the application of the multi-scheme restriction also create serious constitutional questions. 18 U.S.C. §§ 1962(a), (b), and (c) (1982) set out the conduct which constitutes either a civil or criminal RICO violation. Section 1962(d) prohibits a conspiracy to violate any of these provisions. Section 1961 contains the definitions which apply equally to civil and criminal actions. The statutory scheme of RICO therefore requires that the interpretation of pattern be identical in both a civil and criminal action. *See, Northern Securities Company v. United States*, 193 U.S. 197, 401 (1904) (Holms, J. dissenting) ("The words cannot be read one way in a suit

which is to end in fine and imprisonment and another way in one which seeks an injunction"). The civil and criminal portions of the RICO statute are subject to the constitutional standards regarding "vagueness". This means that the standards of conduct must be clear so that a person of ordinary intelligence is given fair notice "that his contemplated conduct is forbidden by statute." *United States v. Hariss,* 347 U.S. 612, 617 (1954). Allowing the courts the ability to theorize and interpret a set of facts to determine whether or not the acts committed by a potential RICO defendant are sufficient to be called "schemes" or "episodes" does not provide sufficient notice to a RICO defendant.

Despite the same statutory language applying to criminal and civil RICO, remarkably, virtually every Eighth Circuit civil RICO case post *Superior Oil* has been dismissed, yet every criminal RICO case upheld. Obviously this illustrates the true reason for the Eighth Circuit's multi-scheme restriction—an attempt to limit civil RICO cases. The Eighth Circuit applies this civil RICO limitation despite lack of support in the case law, the history, the *Sedima* decision, and despite the clear legal impropriety of applying the statute one way for criminal cases, and another for civil cases.

Some courts have interpreted the pattern requirement by requiring a showing that two related acts in connection with an enterprise satisfy the pattern requirement.. *See United States v. Ianniello,* 808 F.2d 184 (2nd Cir. 1986), *cert. denied,* 107 S.Ct. 3230 (1987); *R.A.G.S. Couture Inc. v. Hyatt,* 774 F.2d 1350 (5th Cir. 1985). Such an interpretation would alleviate the problem of notice because there

would be no doubt as to the requirements of RICO. *See, generally,* Bridwels and Cooper, *Hard Law and Bad Cases: The Fourth Circuit Limits Civil RICO,* 22 Wake Forest L. Rev. 715, 720-729 (1987). Under the multiple scheme test of the Eighth Circuit, it is unclear how many acts are needed, how long these acts must continue and for what purpose these acts are done. Serious questions of vagueness can then arise. *See Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (3rd Cir. 1987) (" 'scheme' is hardly a self-defining term"). The Eighth Circuit's restrictions should therefore be overruled.

The multiple scheme approach also raises other practical problems in conducting a lawsuit under RICO. The Eighth Circuit requires instances of other criminal activity to show a pattern for RICO purposes. *Superior Oil Co. v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986). With such an approach, unless two separate schemes have been conducted, both causing the plaintiff injury, the plaintiff would be required to produce evidence regarding other unrelated schemes. This would require the plaintiff not only to have knowledge of schemes injuring others, but also to seek discovery beyond the acts affecting the plaintiff. The multiple scheme requirement places the plaintiff in the following dilemma: plaintiff is required to plead acts with specificity—yet how can a plaintiff specifically describe an act which did not involve the plaintiff? In addition, even if the plaintiff could generally describe a second act, unrelated to himself, there would be significant discovery problems when the plaintiff attempted to make inquiry into these acts which did not, in any way, injure the plaintiff.

This issue is addressed in the context of standing in *Louisiana Power and Light Company v. United Gas Pipe Line,* 642 F. Supp. 781 (E.D. La. 1986). The *Louisiana Power* court felt that the interpretation of the statute posed by *Superior Oil* was clearly wrong. The court criticized the requirement of multiple criminal schemes because a defendant who committed a series of acts in furtherance of a single criminal scheme could not be sued for RICO damages. *Id.* at 808. The court also stated:

> The problem I find in these cases is that to require the plaintiff to prove multiple schemes narrows the reach of the statute too far. The *Fulmer* case would require a plaintiff to prove that the defendant had defrauded or intended to defraud not only the plaintiff but others as well. *Fulmer,* at 257. But surely the plaintiff would not have standing to investigate or raise the issue of criminal activities which injure others. Such conduct neither damages nor threatens the plaintiff, and so, is simply not relevant to the plaintiff's suit. And if the plaintiff has no standing to raise the issue, it will never be able to make out a RICO claim under *Fulmer,* because it will never have the opportunity to prove the defendant's criminal injury of third parties. I refuse to place the RICO plaintiff in such a Catch 22.

Id. at 808-9. Indeed, this situation has been analogized to applying a "one bite rule" to RICO situations where a defendant has committed a singular fraud on a series of victims. Bridwell and Cooper, *Hard Law and Bad Cases: The Fourth Circuit Limits Civil RICO,* 22 Wake Forest L. Rev. 715, 731 (1987).

F. The Eighth Circuit's "multiple scheme" requirement has been subjected to wide-spread criticism by other circuits and lower courts.

The First, Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits have specifically rejected the Eighth Circuit's "multiple scheme" test. District Courts from the Fifth and D.C. Circuits have followed suit. These courts criticize the Eighth Circuit pattern restriction because it is in conflict with *Sedima,* statutory language, legislative history, and the results are contrary to the goals of the statute. *Roeder v. Alpha Industries Inc.,* 814 F.2d 22, 31 (1st Cir. 1987) ("We decline to adopt a definition of pattern that relies solely on whether activity can be classified as a single scheme or episode."); *Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 39 (3rd Cir. 1987) (Rejecting the position that a RICO pattern must involve at least two distinct schemes in that it would exempt those who engage in only one unlawful scheme which is contrary to the purpose of this statute); *International Data Bank Ltd. v. Zepkin,* 812 F.2d 149, 155 (4th Cir. 1987) ("the 'one continuing scheme' test enunciated in . . . [Fulmer] will not always hold true."); *Sun Savings and Loan Association v. Dierdorff,* 825 F.2d 187, 193 (9th Cir. 1987) ("It is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern under *Sedima.*"); *United States v. Ianniello,* 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied,* 107 S.Ct. 3230 (1987) ("We conclude that forcing such a result from the word 'pattern' is a strained inappropriate reading of the statutory language."). *Morgan v. Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986) ("The proposition that the predicate acts must always occur as part of separate

schemes in order to satisfy the continuity aspect of the pattern requirement focuses excessively on continuity, and therefore cannot be accepted as a general rule."); *Bank of America National Trust and Savings Association v. Touche Ross and Company,* 782 F.2d 966, 971 (11th Cir. 1986) ("Acts that are part of the same scheme or transaction can qualify as distinct predicate acts"). *See, also, United States v. Madeoy,* 652 F. Supp. 371, 379 (D.DC. 1987) (a single conspiracy or scheme may also constitute a pattern of racketeering activity); *Louisiana Power and Light v. United Gas Pipeline,* 642 F. Supp. 781, 808 (E.D. La. 1986) ("The reading of the statute proposed by *Inryco* and *Fulmer* is clearly wrong").

In rejecting the Eighth Circuit's approach to pattern, the courts have proposed alternative definitions of pattern. The Seventh Circuit has developed a definition of pattern which is both closer to the words and intent of RICO than the Eighth Circuit. The Seventh Circuit has rejected the view that the predicate acts must always occur as part of separate schemes in order to satisfy the continuity aspect of the pattern requirement as put forth under *Sedima. Morgan v. Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986). The *Morgan* court chose a "middle course" in finding that a pattern is continuous if the predicate acts are ongoing over a period of time so that they can be viewed as constituing "separate transactions." *Id.* The *Morgan* court indicated that the relevant factors include the number and variety of the predicate acts alleged, the number of victims of the alleged activity, the length of time of the activity, the presence of separate schemes, and the occurrence of distinct injuries. *Id.* The court was aware however that the fact that the predicate acts involved the same victim or were related to an overall

scheme did not mean that the pattern requirement had not been met. This approach has been accepted by district courts in the Third Circuit. *Lawaetz v. Bank of Nova Scotia,* 653 F. Supp. 1278, 1287 (D. Virgin Islands 1987).

The Court of Appeals for the Third Circuit has taken a similar approach, noting that the presence of a pattern under RICO "does not turn on the abstract characterization of racketeering acts as 'continuous' and 'related', but rather on a combination of specific factors . . ." *Barticheck v. Fidelity Union Bank/First National State,* 832 F.2d 36, 38-39 (3rd Cir. 1987). These factors include the number of unlawful acts committed, the length of time during which these acts occurred, the character of the activity, the numbers of victims and perpetrators and the similarity of the acts. *Id.* These factors are applied on a case by case basis. *Marshall-Silver Construction Co., Inc. v. Mendel,* 835 F.2d 63, 66 (3rd Cir. 1987).

The approach of examining each RICO claim on a case by case basis and weighing the relevant factors appears promising. Indeed, it appears to be somewhat similar to the definition in *Sedima* where the Court recognized that under 18 U.S.C. § 3575(e) a pattern is formed "if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 473 U.S. at 496, n. 14. This specific approach has recently been used in the D.C. Circuit. In *Yellow Bus Lines, Inc. v. Local Union 639,* 839 F.2d 782 (D.C. Cir. 1988), the court took note that four predicate acts were alleged under a 1962(c) RICO claim. In finding that a pattern existed, the court observed that Congress provided a definition of pattern

in the RICO bill under 18 U.S.C. § 3575(e) (1982). In *Yellow Bus,* the plaintiffs alleged that defendants engaged in acts of vandalism and intimidation with a "unitary goal." 839 F.2d at 789. The court stated: "We believe this scenario meets the statutory requirements for a 'pattern of racketeering activity.'" *Id.*

The Second Circuit has refused to stray from RICO's statutory language in both their pre and post-*Sedima* cases. *See, United States v. Ianniello,* 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied,* 107 S.Ct. 3230 (1987); *United States v. Weisman,* 624 F.2d 1118 (2nd Cir.), *cert. denied,* 449 U.S. 871 (1980). In *Ianniello,* the court held that when a person commits at least two acts that have a common purpose of furthering or continuing a criminal enterprise and that person is associated with that enterprise, the elements of relatedness and continuity in *Sedima* are satisfied for purposes of pattern. 808 F.2d at 192. The court found that relatedness is supplied by the concept of "enterprise," which is defined in § 1962(c) of the statute. Relatedness is also supplied by the ten year requirement of § 1961(5). *Id.* at 190. Because the predicate acts which form the pattern of racketeering activity must all be performed in the conduct of the affairs of an enterprise, the link between the acts is satisfied. Therefore, the necessary element of continuity is also satisfied since the enterprise is a continuing operation. *Id.* The court discussed its interpretation in terms of *Sedima's* suggestion of relatedness and continuity:

> As discussed above, we believe that the inquiry as to relatedness and continuity is best addressed in the context of the concept of "enterprise" expressed in § 1962(c), and to a lesser extent, the ten year requirement of § 1961(5). An enterprise is a "group of persons associated together for a common purpose of engaging in a course of conduct" and "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L. Ed. 2d 246 (1981). This Circuit requires that, under § 1962(c), the enterprise be a continuing operation and that the acts be related to a common purpose. See *Moss v. Morgan Stanley Inc.,* 719 F.2d 5, 21-22 (2d Cir. 1983, cert denied, 465 U.S. 1025, 104 S.Ct. 1280, 79 L. Ed. 2d 684 (1984); *United States v. Mazzei,* 700 F.2d 85, 89 (2d Cir.), cert denied, 461 U.S. 945, 103 S.Ct. 2124, 77 L. Ed. 2d 1304 (1983). This result derives from the language of § 1962(c), which requires that the pattern of predicate acts be done in the conduct of the affairs of the enterprise. See *Weisman,* 624 F.2d at 1122.
>
> *Id.* at 191. The *Ianniello* court went on to hold that when "a person commits at least two acts which have the purpose of furthering the continuing enterprise with which the person is associated, the elements of relatedness and continuity which *Sedima* requires to satisfy § 1962(c) are met." *Id.* at 192.

Under any of these circuits' definitions of pattern it is clear that the instant case would survive. The majority of the circuits have rejected the Eighth Circuit's analysis. The Eighth Circuit should be reversed and Petitioners' Complaint reinstated.

II. This Court should develop a meaningful approach to the definition of "pattern."

Petitioners believe they have, in Section I above, fully shown this Court that the Eighth Circuit's "multiple scheme" restriction must be rejected. However, so as to

avoid the continuation of the conflict which exists in the remaining circuits, Petitioners call upon this Court to settle the controversy. Although this Court has, in *Sedima*, called upon the lower courts to "develop a meaningful concept of 'pattern.'" 473 U.S. at 500, it is now clear that the gap between the circuits is so wide that only this Court can bridge it by fashioning a meaningful approach to that definition.

In creating a definition, this Court should first begin with the statutory language, bearing in mind that it must be liberally construed. *Id.* at 498. Therefore, the definition of pattern should be sufficiently broad to effect RICO's remedial purpose. *Id.* It is clear that at a minimum, two acts as defined in § 1961 are required.

However, in addition to the statutory language, legislative history must be reviewed. This history specifically points to additional considerations—those of "relationship plus continuity." *Id.* at 496, n.14. Courts have erred by focusing on one aspect of the action, such as the racketeering acts, without looking at the whole factual situation in relationship to the statute as a whole. As this Court implied in *Sedima*, this narrow focus on just one element is inappropriate. *See, Id.* ("[W]hile two acts are necessary, they may not be sufficient.") It is consistent with the legislative history and the text of the statute to find that "continuity plus relationship" can be found by looking at the racketeering acts and the activity prohibited under § 1962(a), (b), (c) or (d), and/or the relationship of the acts to the enterprise and/or the acts and the nature of the enterprise itself. In other words, it is only through an examination of the total factual context of each case that a finder of fact can determine whether a

pattern of racketeering activity exists. The factual context approach for examining whether a pattern exists becomes even more important because the nature of the pattern changes depending upon which subsection of the act is alleged. For example, § 1962(b) prohibits a person from engaging in a pattern of racketeering activity to take control of an enterprise. It is clear under 1962(b) that the activity must be related to gaining any interest or control. The nature of the activity suggests continuity in that acts are required to take over the enterprise and continual acts are required to keep that interest or control. Therefore, if, as in the instant case, Respondent bribed two individuals for the purpose of controlling the Public Utilities Commission, a RICO action will stand. The two acts are directy related through the prohibited activity and the enterprise. This demonstrates the "continuity plus relationship" as discussed in the legislative history.

However, if a person bribes a member of a corporation with the purpose of taking control of that corporation and also commits the act of arson for the sole purpose of defrauding an insurer, no 1962(b) RICO action would lie. The two acts, although satisfying the definition of "racketeering activity" have no connection in a 1962(b) case; they are not related to prohibited activity and/or the enterprise; they are indeed "isolated incidents".

One can see how the definition of pattern changes according to the subsection pleaded. The above facts, although not satisfying a 1962(b) RICO action, may well form a pattern for a 1962(c) action. One must consider, for example, were the acts of arson and bribery committed by people conducting an ongoing enterprise? Did the acts

constitute regular enterprise activity? The pattern issue can only be resolved when examined in this fashion. To formulate a hard and fast legal rule is an impossibility, for the rule cannot apply equally in each of the subsections. Indeed, such an approach—a factual context approach—was suggested in 18 U.S.C. § 3575(e), as quoted in footnote 14 of *Sedima*. If the Court chooses to include the various factors from 18 U.S.C. § 3575(e) or the various factors laid out by the Seventh Circuit in *Morgan*, or the Third Circuit in *Barticheck*, it should note that these considerations only illustrate the type of factors which must be used for determining pattern.

Finally, continuity must be looked at in terms of the ongoingness of the activity when it is occuring rather than at its end when the activity has been discovered. *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3rd Cir. 1987) (rejecting the requirement of open-endedness, stating such an interpretation "would deny a RICO cause of action in a case where the scheme had fully accomplished its goal."); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1308-09 (7th Cir. 1987) ("Continuity refers instead to the duration of the predicate acts"); *Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 194 n.5 (9th Cir. 1987) ("As long as a threat of continuing activity exists at some point during the racketeering activity, the continuity requirement is satisfied.").

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CONCLUSION

Under the pattern of racketeering activity standard as suggested above, it is clear that Petitioners have properly pleaded violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). It is also clear that under any test used by any circuit other than the Eighth Circuit, Petitioners have likewise properly alleged a "pattern of racketeering activity." For the foregoing reasons, the Eighth Circuit should be reversed and Petitioners' Complaint reinstated.

Respectfully submitted,

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